BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF NATIONAL CAN CORPORATION, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 615 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $1,500.00 civil penalty for an alleged violation of RCW 90.48.080, came before the Pollution Control Hearings Board, W. A. Gissberg, presiding, and Chris Smith at a formal hearing in the Board's office in Lacey, Washington on November 4, 1974.

Appellant appeared by and through its attorney, Fred D. Gentry; respondent appeared by and through Thomas C. Evans, assistant attorney general. Richard Reinertsen, Olympia court reporter, recorded the proceedings.

Having heard the testimony, having examined the exhibits, having

considered the contentions of the parties, and having received exceptions to said proposed Findings, Conclusions and Order from appellant and having considered and denied same, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

Appellant, National Can Corporation, operates a plant located in Kent, Washington. This plant produces aluminum cans for the beverage industry.

II.

On March 19, 1974 an inspector for METRO (Municipality of Metropolitan Seattle) observed that a green liquid emanating from appellant's barrel storage area was flowing into a catch basin. After determining that the liquid was highly acidic, the inspector took a sample for chemical analysis. The analysis confirmed the high acidity previously noted.

III.

The appellant was contacted and requested to immediately clean up the area. The area was washed down with water for two hours. After this, the catch basin was flushed with water for an additional half hour.

IV.

On March 20, 1974 respondent was informed of the events. Respondent's inspector visited the site and determined, by means of litmus paper, that the liquid in the catch basin was acidic. A sample was taken. The source of the liquid was again traced to the appellant's barrel storage area.

V.

The subject catch basin is connected to the storm sewer. The storm sewer flows into Mill Creek and the Green River, which are public waters of this state.

There is no evidence that appellant removed the green liquid from the catch basin. Instead, as noted in Finding of Fact III, appellant merely washed down the area and flushed the catch basin with water. There was no place for the effluent to go except into Mill Creek and the Green River. The amount of water was sufficient to carry the green liquid into public waters.

VI.

An analysis of the liquid sample taken by respondent from appellant's catch basin showed that the specimen was highly acidic (pH 1) and contained 300 mg per liter of chromium.

VII.

The substance taken from appellant's catch basin is harmful if discharged into public waters. This is especially true in its effects upon aquatic life. The same harm would occur even though no chromium were present in the substance.

VIII.

As a result of the above-recounted events, respondent issued a Notice of Penalty Incurred and Due (DE 74-64) in the amount of $1,500.00 for permitting the discharge of a conversion coating solution containing chromium into public waters of this state in violation of RCW 90.48.080. Appellant's application for relief from this penalty was denied by respondent. Thereafter, appellant appealed to this Board seeking the

reduction, dismissal or suspension of the penalty.

IX.

Chromic acid used by appellant in its manufacturing process was stored in barrels. These barrels were either manually or automatically emptied. Using either method, at least one pint of liquid remained, and could be expected to remain, in each barrel.

The "empty" barrels were removed by appellant's employees from the plant to the outside storage area. Under an unwritten arrangement with Seattle Barrel Co., appellant allowed these "empty" barrels to be removed. Appellant was not involved either physically or in a supervisory capacity in the barrel loading and removal process. It was during this removal process that the chemical escaped from the barrels and flowed toward the catch basin.

IX.

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

No showing of negligence is necessary for the proving of a violation of RCW 90.48.080 whose terms simply make it unlawful "to cause, permit or suffer" any polluting matter to "drain" into the waters of this state. That statute establishes liability without fault, or strict liability.

II.

The liquid matter from the catch basin, whether it contains chromic

and/or acid, is a pollutant within the meaning of RCW 90.48.020, which provides that:

> Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life. (emphasis added)

III.

RCW 90.48.080 provides:

> Discharge of polluting matter in waters prohibited. It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter.

The preponderance of the evidence shows that the appellant did "permit" and "suffer" a discharge of a matter in the public waters of the state that would cause "pollution." "Permit" means "to suffer, allow, consent, let; . . . to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." BLACK'S LAW DICTIONARY 1298 (4th ed. 1968). See also, "suffer." Id. at 1601. The term "suffer" in RCW 90.48.080 adds a dimension which emphasizes that to "suffer" a discharge can even be done unwittingly. See U.S. v. White Fuel, 6 ERC 1794, 1795 (1974). Thus, whether appellant did "permit" or did "suffer" a discharge of pollutants is of no moment. There is no question

that each barrel discarded by the appellant contained a substantial amount of chromic acid, and this was known to the appellant. Notwithstanding this knowledge, appellant took no precautions to properly contain the pollutant and was content to allow someone else to deal with the problem should that someone discover such problem. Under the circumstances of this case, appellant not only "suffered" the discharge of the pollutant but was a material element and a substantial factor in bringing it about because it created the risk that the events that did occur would occur.

IV.

For the violation of RCW 90.48.080, a penalty was properly assessed under RCW 90.48.144. In view of all the circumstances of this case, the assessment of the penalty is neither unreasonable in amount nor unconstitutional. See Yakima County Clean Air Authority v. Glascam Builders, Inc., No. 43143 (Wash. S. Ct., April 17, 1975).

V.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

ORDER

The $1,500.00 civil penalty is affirmed.

DONE at Lacey, Washington this 18th day of June, 1975.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith

CHRIS SMITH, Chairman

W. A. Gissberg

W. A. GISSBERG, Member